Appendix A: Statutes Involved

28 U.S.C. § 1491

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:

(1) Founded upon the Constitution; or

(2) Founded upon any Act of Congress; or

(3) Founded upon any regulation of an executive department; or

(4) Founded upon any express or implied contract with the United States; or

(5) For liquidated or unliquidated damages in cases not sounding in tort.

Act of March 9, 1920

41 Stat. 525, 46 U.S.C. §§ 741, 742

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock, or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided,* That this Act shall not apply to the Panama Railroad Company.

Sec. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned

and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. . . .

ACT OF MARCH 3, 1925

43 Stat. 1112, 46 U.S.C. §§ 781, 782

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided,* That the cause of action arose after the 6th day of April, 1920.

SEC. 2. That such suit shall be brought in the district court of the United States for the district in which the vessel of cargo charged with creating the liability is found within the United States, or if such vessel or cargo be outside the territorial waters of the United States, then in the district court of the United States for the district in which the parties so suing, or any of them, reside or have an office for the transaction of business in the United States; or in case none of such parties reside or have an office for the transaction of business in the United States, and such ves-

sel or cargo be outside the territorial waters of the United States, then in any district court of the United States. . . .

MERCHANT SHIP SALES ACT OF 1946

60 Stat. 43, 50 U.S.C. App. § 1738

CHARTER OF WAR-BUILT VESSELS TO CITIZENS

SEC. 5. (a) Any citizen of the United States and, until July 4, 1946, any citizen of the Commonwealth of the Philippines, may make application to the Commission to charter a war-built dry-cargo vessel, under the jurisdiction and control of the Commission, for bare-boat use. The Commission may, in its discretion, either reject or approve the application, but shall not so approve unless in its opinion the chartering of such vessel to the applicant would be consistent with the policies of this Act. No vessel shall be chartered under this section until sixty days after publication of the applicable prewar domestic cost in the Federal Register under subsection 3 (c) of this Act.

(b) The charter hire for any vessel chartered under the provisions of this section shall be fixed by the Commission at such rate as the Commission determines to be consistent with the policies of this Act, but, except upon the affirmative vote of not less than four members of the Commission, such rate shall not be less than 15 per centum per annum of the statutory sales price (computed as of the date of charter). Except in the case of vessels having passenger accommodations for not less than eighty passengers, rates of charter hire fixed by the Commission on any war-built vessel which differ from the rate specified in this subsection shall not be less than the prevailing world market charter rate for similar vessels for similar use as determined by the Commission.

(c) The provisions of sections 708, 709, 710, 712, and 713, of the Merchant Marine Act, 1936, as amended, shall be applicable to charters made under this section.

(d) Where an operator is engaged both in the foreign trade and in the domestic trade (coastwise or intercoastal), additional charter hire determined with reference to voyage profits of the chartered vessels, under regulations promulgated by the Maritime Commission, shall be computed, accounted for, and paid separately on such foreign trade and shall be computed, accounted for, and paid separately on such domestic trade, covering all voyages commencing subsequent to June 30, 1947.[1]

MERCHANT MARINE ACT, 1936

49 Stat. 2010, 46 U.S.C. § 1199

SEC. 709. (a) Every charter made by the Commission pursuant to the provisions of this title shall provide that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum: *Provided*, That the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years.

(b) Every charter shall contain a definition of the terms

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[1] Subsection (d) was added by the Act of June 28, 1947, 61 Stat. 190.

"net voyage profit" and "fair and reasonable overhead expenses", and "capital necessarily employed", as said terms are used in subsection (a) of this section, setting forth the formula for determining such profit and overhead expense and capital necessarily employed, which definitions shall have been previously approved by the Commission and published in the advertisement for bids for such charter.

Appendix B: Order and Opinion Below

IN THE UNITED STATES COURT OF CLAIMS

(Decided March 6, 1956)

No. 98-55

SMITH-JOHNSON STEAMSHIP CORP.,

v.

THE UNITED STATES

No. 262-55

PACIFIC FAR EAST LINE, INC.,

v.

THE UNITED STATES

No. 314-55

BLACK DIAMOND STEAMSHIP CORP.,

v.

THE UNITED STATES

Mr. Arthur M. Becker for plaintiff in case No. 98-55; *Messrs. Melvin Spaeth, Gerald B. Greenwald,* and *Becker & Maguire* were on the briefs. *Mr. J. Franklin Fort* for plaintiff in case No. 262-55; *Messrs. Radner, Zito, Kom-*

iners & Fort, and *Israel Convisser* were on the briefs. *Mr. George F. Galland* for plaintiff in case No. 314-55; *Messrs. William J. Lippman, Robert N. Kharasch*, and *Galland & Kharasch* were on the briefs.

Mr. Leavenworth Colby, with whom was *Mr. Assistant Attorney General Warren E. Burger*, for defendant.

On Plaintiff's Motion to Strike Defendant's Special Defense in Case No. 98-55, and on Defendant's Motions to Dismiss in Cases Nos. 262-55 and 314-55.

Opinion

Whitaker, *Judge*, delivered the opinion of the court:

Plaintiff alleges in the *Smith-Johnson Steamship Corporation* case that the defendant exacted from it for the hire of certain vessels more than was authorized by the Merchant Ship Sales Act of 1946 (60 Stat. 41), 50 U. S. C. App. 1735, et seq., and the Merchant Marine Act of 1936 (49 Stat. 1985), 46 U. S. C. 1101, et seq. It sues for the excess. Defendant in its answer sets up the special defense that this court lacks jurisdition of the subject matter, because, it says, plaintiff's cause of action is on the contract for the hire of the vessels and is, therefore, maritime in nature, of which actions the admiralty courts have exclusive jurisdiction. Plaintiff says its action is on the statute and it moves to strike defendant's special defense.

The Merchant Ship Sales Act of 1946 provided for the charter of war-built vessels. Section 5 (b) authorized the United States Maritime Commission to fix the charter hire for vessels at such rates as the Commission should determine to be consistent with the policy of the Act. Plaintiff says that, in fixing the charter hire for the vessels chartered to it, the Commission went contrary to the policy of the Act in that it exacted from it a stated hire and in

addition percentages of its profits on the voyages of the vessels in excess of the percentages authorized by the Act.

Section 5 (c) of the Act incorporated section 709 (a) of the Merchant Marine Act of 1936 (49 Stat. 1985, 2010) which provided:

> Every charter made by the Commission * * * shall provide that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum: *Provided,* that the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years.

The charter agreement tendered plaintiff by the Maritime Commission provided for a basic charter hire and also for additional charter hire as follows:

> Clause 13. *Additional Charter Hire.* If at the end of the calendar year 1946, or any subsequent calendar year or at the termination of this Agreement, the cumulative net voyage profit (after the payment of the basic charter hire hereinabove specified and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the vessels) shall exceed 10 per centum per annum on the charterer's capital necessarily employed

in the business of the vessels (all as hereinafter defined), the charterer shall pay over to the owner at Washington, D. C., within 30 days after the end of such year or other period, as additional charter hire for such year or other period, an amount equal to the percentages of such cumulative net voyage profit in excess of 10 per centum per annum on such capital computed in accordance with the following table (but such cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in any subsequent year or period):

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) not in excess of $100 per day—50%.

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $100 per day but not in excess of $300 per day—75% on such excess over $100 per day.

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $300 per day—90% on such excess over $300 per day.

The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire and on account of any additional charter hire accrued under any War Shipping Administration Form 203 "WARSHIPDEMISEOUT" charter (prior to the times of payment provided for above or in such WARSHIPDEMISEOUT chartered) at such times and in such manner and amounts as may be required by the Owner; provided, however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of prelimi-

nary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required.

Plaintiff says this charter agreement exacted a percentage of its profits in excess of that authorized by law. Nevertheless, the charter agreement was executed and eight vessels were delivered to plaintiff. While the charter agreement was in effect plaintiff made preliminary payments of additional charter hire to defendant, pursuant to clause 13 of the agreement, quoted above, totalling the sum of $613,395.32. By final audit completed on February 4, 1955, defendant determined that, at the time of the audit, a total of $616,063.04 had accrued to defendant as additional charter hire under the charter agreement, which was paid on demand. Plaintiff seeks to recover $231,773.81 of the amount paid defendant as additional charter hire, on the ground that the contract exacted this much more than was authorized by law.

The issue presented is whether plaintiff's claim is on the contract, and, therefore, maritime in nature, of which the district courts have exclusive jurisdiction, or is a claim based on the statute, of which this court is given jurisdiction by section 1491 of Title 28 U. S. C.

Defendant says the action is maritime under both the Public Vessels Act and the Suits in Admiralty Act. The Public Vessels Act is not applicable because the vessels involved herein are not public vessels; only the Suits in Admiralty Act is pertinent. This Act confers exclusive jurisdiction on the district courts only in situations where, if the vessels were privately owned, a proceeding in admiralty could be maintained. *D. C. Andrews & Co.*, v.

United States, 129 C. Cls. 574. If plaintiff were basing its claim on the charter agreement, the action would clearly be maritime in nature and maintainable in admiralty; but plaintiff does not base its claim on the charter agreement, but on the ground that the agreement exacted more than could lawfully be exacted. The contract has been performed according to its terms. No cause of action on the contract exists. Plaintiff's claim can only be grounded on the fact that the contract required more than the law authorized. Hence, its action is based on the statute, and this court, therefore, has jurisdiction.

Defendant relies upon *Krauss Bros. Co.* v. *Dimon S. S. Corp.*, 290 U. S. 117, but in this case, plaintiff's claim was based on the contract, and not on the ground that the contract had exacted more than the law allowed. Plaintiff alleged that it had paid more for the carriage of freight than was due under the contract and sought to recover the amount of the overpayment. Admiralty had jurisdiction because the suit was on a maritime contract. The case is not in point on the question before us.

In *Archawski* v. *Hanioti*, 223 F. 2d 406, the Court of Appeals for the Second Circuit said that an action by prospective passengers to recover money paid for passage on a vessel that never sailed was a common law action of *indebitatus assumpsit*, of which the admiralty courts had no jurisdiction. The Supreme Court granted certiorari, and it may be it will hold that the action was for a breach of a maritime contract, of which the admiralty courts have jurisdiction; but, even so, such a decision could not affect the decision of this case, since we think this is a suit based not on a contract, either maritime or at common law, but on a statute.

The Second Circuit, in an opinion by a pre-eminent jurist, decided *Sword Line, Inc.* v. *United States*, 228 F.

2d 344, in which it took a view contrary to what we have expressed. It said in effect that the parties are presumed to have agreed on a hire for the vessels no greater than the law allowed and, hence that the suit for excessive exaction was a suit on the contract, of which the courts of admiralty have jurisdiction. But no such presumption can be indulged in the case at bar, because it is contrary to the facts. The parties in fact did agree on a hire greater than the law allowed—taking the allegations of the petition to be true.

If the Government is not entitled to retain the excess, it is not because plaintiff did not agree to pay it, but because the statute did not authorize the exaction of so much. If plaintiff is entitled to recover, it is because its rights under the statute have been violated, not its rights under the contract.

For the reasons stated, we conclude that the plaintiff's cause of action is non-maritime in nature, and is one which could not be maintained in a court of admiralty. Accordingly, the claim falls within the jurisdiction of this court, and plaintiff's motion to strike defendant's special defense of want of jurisdiction is granted.

Defendant, in cases Nos. 262-55 and 314-55, has moved the court to dismiss for lack of jurisdiction. Relative to the question of jurisdiction, the causes of action asserted in the petitions of the respective plaintiffs in these cases are identical to the cause of action asserted in *Smith-Johnson Steamship Corporation* v. *United States*, No. 98-55. For reasons stated above, we hold that this court has jurisdiction over the subject matter of these causes of action. Therefore, defendant's motions to dismiss for lack of jurisdiction must be denied.

It is so ordered.

LARAMORE, *Judge;* MADDEN, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge,* concur.

Appendix C: Opinions in the Sword Line Case

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 160—October Term, 1955.

(Argued November 7, 1955 Decided December 14, 1955.)

Docket No. 23723

SWORD LINE, INC.,

Appellant,

v.

UNITED STATES,

Appellee.

Before: CLARK, *Chief Judge,* HAND and WATERMAN *Circuit Judges.*

On appeal from a decree in the admiralty of the District Court of New York—Murphy, *J.,* presiding—in a suit to recover hire, alleged to have been unlawfully collected from the libellant, as charterer of vessels owned by the United States.

THEODORE J. BREITWIESER, *for the appellant.*
BENJAMIN H. BERMAN, *for the appellee.*

HAND, *Circuit Judge:*

The libellant appeals from a decree in the admiralty, dismissing its libel upon "exceptive allegations," filed by the respondent. The claim, as alleged in the libel, was as fol-

lows. The Maritime Commission had chartered to the libellant forty-four vessels upon a "bare-boat charter," by virtue of authority granted by § 5 of the Merchant Ships Act of 1946.[2] Subdivision (c) of this section incorporates § 709 of the Merchant Marine Act of 1936,[3] which provides that, if at the end of any calendar year after such a charter is executed, the "cumulative net voyage profits" shall be greater than ten per cent of "the charter's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Commission, as additional charter hire one-half of such cumulative net voyage profit in excess of 10 per centum per annum." This language the Commission has construed to allow it to reserve as part of the hire more than one-half the surplus of the charterer's profit above ten per cent; and for this reason the charter in suit contained a sliding scale for the division of profits. The Commission's share was one-half the excess of profits over 10%, when the excess was not more than $100 a day; three quarters, when it was between $100 and $300; and nine-tenths, when it was over $300. The libellant accepted these terms; filed accounts with the respondent, "based upon the accountings prepared by respondent"; and paid the resulting sums as part of the hire. The suit is based upon the proposition that § 709 fixed the division of profits at fifty per cent of the excess profits regardless of its amount, and that the commission unlawfully forced the libellant to pay $1,800,000 above what was due.

The "exceptive allegations" alleged that the Commission put an end to the charter on July 27, 1948, by virtue of a reserved power; and that on July 30, 1948, the libellant filed a petition for an "arrangement" under Chapter XI of the Bankruptcy Act. On January 11, 1950, the Commis-

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[2] 60 Stat. at L. 41.
[3] 49 Stat. at L. 1985.

sion filed a claim in this proceeding for about $4,000,000, and on February 23, 1952, the libellant filed an "amended plan of arrangement," in the fourth paragraph of which it agreed that the respondent should "be paid the sum of $1,250,000 in full and complete compromise and settlement of all indebtedness of the Debtor to the United States of America and of all claims existing on July 30, 1948 between the United States of America and the Debtor." The respondent accepted the plan as so amended, and the referee in bankruptcy confirmed it on July 31, 1952. The libel was filed on July 28, 1954. The respondent raises two points in answer to the claim. First, it says that the claim arose on October 26, 1948, the day when the libellant surrendered the ships in accordance with the charter; and that, as that was more than two years before the libel was filed, the district court had no jurisdiction over the suit.[4] Second, it says that in any event the confirmation of the "arrangement" was a bar to the claim upon the merits. Judge Murphy did not pass upon the first point, because the respondent did not urge it; but he supported the respondent on the second and dismissed the libel by a decree which must have meant a dismissal upon the merits, though it did not so declare.

Before considering these two issues, we must decide whether the district court had any jurisdiction in admiralty over the controversy; for, although neither side has raised this objection, it is a question that under familiar law we must answer. The claim has for its premise that § 709 of the Merchant Marine Act of 1936 made illegal that portion of "Clause 13" of the charter that stipulated for the graduated scale of profit-sharing instead of for a division half and half, regardless of amount. It might be argued, if the libellant is right about § 709, that no contract was ever made, because the section made the libellant's promise un-

[4] *Sgambati* v. *United States*, 172 Fed. (2) 297 (C. A. 2).

enforceable and there were therefore no mutual promises. On the other hand, if the statute did indeed limit the Commission to an even division of profits, it was the Commission's duty so to limit the libellant's promise; and we should not assume that the Commission would not have chartered the ships, unless it was to receive the unlawful hire. Obviously, we may impute to the libellant willingness to pay the lesser hire; so that it is proper to proceed as though there had been a contract for an even division, and nevertheless the Commission had compelled the libellant to pay more than the disputed hire.[5] The suit is therefore in quasi contract for money had and received. In *United Transportation & Lighterage Co.* v. *New York & Baltimore Transportation Line,* 185 Fed. Rep. 386, this court in 1911 after a full examination held that such claims were not so far maritime as to be justiciable in the admiralty; the Ninth Circuit held the same thing in 1926,[6] and in a dictum we repeated the doctrine in 1947.[7] Even though I were better convinced than I am that our original decision was wrong, I should feel it my duty to follow it and to leave the question to the Supreme Court, were it not for *Krauss Bros. Lumber Co.* v. *Dimon S.S. Co.,* 290 U. S. 117 (1933), of which we were apparently not aware when we decided *Silva* v. *Bankers Commercial Corporation, supra* (163 Fed. (2) 603.) The Supreme Court held that, when a carrier had exacted more than the stipulated freight, the shipper might recover the excess by a suit in the admiralty to enforce a maritime lien. There could of course be no doubt that, if the owner had refused to deliver the goods until the excess was paid, he would have

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[5] *A. H. Bull Steamship Co.* v. *United States,* 108 Fed. Supp. 95, 99 (Ct. Cl.); *Southeastern Oil Florida Inc.* v. *United States,* 119 Fed. Supp. 731, 734 (Ct. Cl.).

[6] *Home Insurance Co.* v. *Merchants Transportation Co.,* 16 Fed. (2) 372.

[7] *Silva* v. *Bankers Commercial Corporation,* 163 Fed. (2) 603.

broken his promise to deliver and the suit would be cognizable in the admiralty, although the damages might not be measured by the unlawful excess. That was not—at least as I read the opinion—the Court's reasoning; it assumed that the goods had been delivered, and put its decision upon the premise that the carrier had promised, not only to deliver the goods for the agreed hire, but thereafter not to demand anything further; and such a demand, if it was indeed a breach of the maritime contract, was of course cognizable in the admiralty. Having so interpreted the contract, the Court did not find it necessary to decide whether a claim in quasi-contract, based upon an unjust exaction after the contract had been completely performed, was also cognizable in the admiralty. For my own interpretation of the decision I rely upon what Stone, *J.*, said on page 124 which is all there is on the point: "Even under the common law form of action for money had and received there could be no recovery without breach of the contract involved in demanding the payment, and the basis of recovery there, as in admiralty, is the violation of some term in the contract of affreightment, whether by failure to carry or by exaction of freight which the contract did not authorize." My brothers do not agree with such a limited understanding of the decision; they think that it should be read so as to cover claims in quasi-contract; but under either understanding it is clear that the district court had jurisdiction over the suit at bar.

That does not, however, dispose of the jurisdictional objection raised by the respondent: *i.e.*, that the suit was filed more than two years after October 26, 1948, the day on or before which all the chartered ships had been returned to the Commission. If the claim arose on that day, concededly the libel was too late, for October 26, 1950 was the last day of the two years that followed.[8] It is common ground

[8] *Sgambati* v. *United States, supra* (172 Fed. (2) 297 (C. A. 2)).

that this period of limitation, like all such periods, did not begin to run until the first day when the obligee could have brought suit; and my brothers think that the libellant could have sued October 26, 1948, because all the facts were then in existence on which the computation of the profits depended. I agree that the period of limitation ordinarily does begin to run as soon as all the facts have occurred from which the claim can be liquidated, and that the statute is not tolled because a computation, however complicated, is necessary to ascertain its amount. However, there is a well-recognized exception in the case of mutual accounts, and the right answer here turns upon whether this was such an occasion. In *Spring* v. *Gray*, 6 Pet. 151, the owner sued to recover as freight half the net profits made upon the investment abroad of the proceeds of a cargo shipped for a voyage to Algiers. The defendant pleaded the Statute of Limitations and the libellant answered that the action was upon an "open" account. The Court said that the account was not "open" because (p. 165), although "the sales of the outward and inward cargo and the expenses attendant on the enterprise must be examined to ascertain the amount of freight," the account was nevertheless "founded on the trade of the affreighter alone, to which reference must be made in order to ascertain the amount of the freight." That decision, therefore, did hold that the statute would have been a bar in the case before us, if the suit had been, either by the Commission against the libellant only to recover the proper proportion of its profits, or by the libellant only to recover payments that it had made in supposed compliance with its obligation. It is indeed true that it was to recover payments which the Commission asserted were due under the charter; but it seems to me of critical importance, not only that the Commission decided *ex parte* how much these should be, but that they were to be provisional or contin-

gent payments. They were described as "preliminary," to be paid "at such times and in such manner and amount as may be required by the Owner"; and I think that, when they became items in later accounts between the parties, those accounts were "mutual." This follows, I submit, from the language of "Clause 13" that immediately followed, which provided that the payments were to be "subject to adjustment either at the time of the rendition of preliminary statements, or upon the completion of each final audit by the Owner." As I read the plan, it was that the libellant must pay whatever the Commission provisionally fixed as its share of the profits; that these amounts should be finally determined either by "statements" rendered, or by final audit of the Commission. There can be no doubt that this involved an account made up of cross items, for upon the "adjustments" "such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the charterer as may be required." In short, the profits to which the Commission would be entitled were to remain in abeyance and to be ascertained by seeing how they matched with the libellant's "preliminary" payments. True, when the suit was brought, the facts had all existed for more than two years on which the "adjustments" would be made; but the balance either way was not due until they had been made, and no suit could have been filed until then, at least without showing that the Commission had refused to make the "adjustments." Indeed, to me it would appear most unjust to bar the libellant's claim without such evidence.

Since, however, my brothers think otherwise, we need not decide the merits of the appeal, and I should not discuss them, were it not that they prefer to rest our decision as well on the merits as on the point of jurisdiction. We all think that the confirmation of the "arrangement" re-

leased any claims the libellant may have had. In addition to the language already quoted from the fourth article of the "amended arrangement," it later provided that "upon the acceptance of the plan by United States of America and its confirmation by the Court, the payment by the Debtor of the amounts provided for in this Article 4 shall constitute a full and complete satisfaction, binding upon the Debtor and upon the United States of America, of any and all claims and indebtedness, of whatsoever nature and description between the Debtor and the United States of America existing on July 30, 1948." That not only released the libellant from any claims that the Commission might have against the libellant; but also released the Commission from all claims that the libellant might have against the Commission. Indeed, the libellant challenges its scope only because, immediately following the words just quoted, the article goes on to exclude ship mortgages to the United States, contingent liabilities of the libellant to third persons, present or future, and "any claims for refunds of taxes accrued prior to July 30, 1948."

The libellant argues that this specific release of existing taxes limited the preceding words of general release within the doctrine that general words of release, followed or preceded, by a special and limited release are to be read as limited to the specified claim and are really redundant. We have recently applied this doctrine three times,[9] and have no wish to disturb its authority; but, as we have always said, it is at most only a canon of interpretation, and in the case at bar it would frustrate the most important purpose of the "arrangement" to limit it to the taxes specified. The petition to the Bankruptcy Court alleged that it was the Commission's seizure of the ships that had compelled

[9] *Vines* v. *General Outdoor Advertising Co.*, 171 Fed. (2) 487, 492; *Kelcey* v. *Tankers Company*, 217 Fed. (2) 541, 547; *Eagle Lion Films* v. *Loew's Inc.*, 219 Fed. (2) 196, 198.

the libellant to seek the "arrangement," and that, not only did it owe $2,400,000 for hire, but that the Commission owed it $3,400,000, thus necessarily bringing into the proceeding the amount of that claim. The taxes at stake were only a trifling part of the mutual claims, and to confine the composition to them would be to leave out the most important elements of the whole proceeding. It makes no difference whether in July, 1948, the libellant, as it now asserts, may not yet have learned that the Commission had collected from it more than the statute allowed; for it stands beyond cavil that the prime purpose of the "arrangement" was to wipe the slate clean as between the parties.

Finally (let me add for myself), even though I may be right in thinking that the libellant could not have brought any action until long after October 26, 1948, the release still discharged the libellant's claims. The "amended arrangement" was not executed till February 21, 1952, and the fact that any suit to recover whatever claims the libellant had, was conditional upon some "adjustment," did not prevent the unadjusted claims themselves from being released *in praesenti.*

The decree will be affirmed, and the libel dismissed for lack of jurisdiction of the district court.

Decree affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 160—October Term, 1955.

(Petition filed January 18, 1956
Decided February 24, 1956.)

Docket No. 23723

SWORD LINE, INC., *Libellant-Appellant,*

v.

UNITED STATES, *Respondent-Appellee.*

Before:

CLARK, *Chief Judge,* and
HAND and WATERMAN, *Circuit Judges.*

On rehearing.

THEODORE J. BREITWIESER, New York City, for *libellant-appellant.*

WARREN E. BURGER, Asst. Atty. Gen., LEAVENWORTH COLBY, Chief, Admiralty & Shipping Section, and BENJAMIN H. BERMAN, Atty., Admiralty & Shipping Section, Dept. of Justice, Washington, D. C. and PAUL W. WILLIAMS, U. S.

Attorney for the Southern Dist. of New York, New York City, *for respondent-appellee.*

CLARK, *Chief Judge*:

Though interesting and important, the further material supplied us for the first time on rehearing does not convince us of any error of law in our decision of December 14, 1955. But since this material is important in itself and does indicate wider reaches to the issues involved than we had known, it seems desirable to cite it here; and because Judge Waterman and I take a slightly different approach from Judge Hand, we ought to avoid any chance of confusion by stating our views more explicitly, though Judge Hand was perfectly fair in his opinion to our divergencies.

This was a libel in admiralty in quasi contract for alleged overpayment of charter hire for government merchant vessels. We held that admiralty had jurisdiction, that the claim was time barred, and that additionally it was also barred by a release and compromise with the government effected by a confirmed plan in completed arrangement proceedings of the Sword Line as debtor. At that time libelant had expressly accepted admiralty jurisdiction, leading to the government's somewhat perfunctory notation of jurisdiction, with a formal citation or two; but nevertheless we raised the question at the argument and necessarily considered it with some care, as was our duty. Though our conclusion accorded with that then held by counsel, it obviously suggested to libelant a point it had overlooked; for now the real issue on this rehearing has centered upon libelant's claim vigorously pressed that admiralty lacked jurisdiction and that we had overlooked relevant authorities in holding otherwise.

While the other two issues were also reargued, there is nothing further really to be said on them. We are still all agreed that the release in the Plan of Arrangement ended all claim by libelant; the old Latin maxim *expressio unius* cannot be stressed to defeat the very obvious intent of the parties, as we pointed out before. As to the statute of limitations, the whole point was whether the two-year period dated from the time of the acts involved, namely, the overpayments, or only from a later audit provided for in Clause 13 of the charter party. While Judge Hand felt that under the circumstances the audit was necessary to start the time running, we thought the authorities required the contrary view. See e.g., *United States* v. *Atlantic Mut. Ins. Co.*, 298 U. S. 483. There is nothing to the point that payment of an unearmarked portion of the agreed-upon compromise of the government's four million dollar claim in the arrangement proceedings started the time running anew. And so we turn to the interesting and important question of admiralty jurisdiction.

The problem arises because earlier cases in this circuit and elsewhere, cited in our original opinion, had ruled that admiralty had no jurisdiction in quasi contract. The general thesis was that such action arose out of an implied contract and that such implied contract was collateral to any maritime contract, such as the one here for charter hire, and was not within the purview of admiralty. Part of the supporting rationale was that this form of remedy was really an equitable one and that admiralty had no jurisdiction over equity. The theory was brilliantly criticized, see, e.g., Chandler, *Quasi Contractual Relief in Admiralty*, 27 Mich. L. Rev. 23; Morrison, *The Remedial Powers of the Admiralty*, 43 Yale L. J. 1; Robinson on Admiralty 197-200 (1939), and, being of somewhat doubtful character, was not followed so consistently in the cases as to leave a line

of clear demarcation of its aegis. In fact, the rationale had little to commend it even on its own ground, for admiralty does resort to and employ equitable principles rather widely. See discussion by Mr. Justice Frankfurter in *Swift & Co. Packers* v. *Compania Colombiana Del Caribe, S.A.*, 339 U. S. 684, 689-696, 19 A. L. R. 2d 630, citing eminent authority. And the ancient remedy in quasi contracts, whatever its origin or slant, was distinctly not a proceeding in equity, but was the very means historically of getting into the nonchancery courts. *Stone* v. *White*, 301 U. S. 532; *Moses* v. *Macferlan*, 2 Burr. 1005, 97 Eng. Rep. 676 (K. B. 1760); Ames, *The History of Assumpsit*, 2 Harv. L. Rev. 53, Lectures on Legal History 129 (1913).

Moreover, as these and other well-known authorities show, the existence of a contract, implied in law, is a pleasant, if productive, fiction. Actually recovery is based upon principles of justice and good conscience; and it is fictitious to think of some collateral nonmaritime implied contract as even existing, not to speak of controlling. In truth this is a refund of maritime payments originally enforceable in admiralty; there is no good reason for holding that the court which would decree the payment in the first instance should not decree the repayment which the admiralty law now requires. Logic, as well as convenience, dictates such jurisdiction, rather than the discovery of some narrow distinction to send a litigant elsewhere for perhaps a part of an entire claim. For certainly the claim, together with a natural counterclaim or offset, should properly come up in the same litigation without dismemberment and splitting into two lawsuits separtely considered.

Against this background the views of the Supreme Court are of course most pertinent. In *Krauss Bros. Lumber Co.* v. *Dimon S.S. Corp.*, 290 U. S. 117, that Court held that

recovery of an admiralty overcharge there enforced by lien against a vessel was properly had in the admiralty; and in the course of the discussion it minimized the form of recovery, saying—in addition to the quotation made in our original opinion—in answer to the claim that "the demand is upon a cause of action for money had and received, which lies only at common law and not in admiralty," that "Admiralty is not concerned with the form of the action, but with its substance." 290 U. S. at 124. Hence this case is taken quite generally by commentators as overruling the earlier line of cases barring quasi contractual claims in admiralty. See, e.g., 23 Calif. L. Rev. 343; 34 Col. L. Rev. 358; 47 Harv. L. Rev. 519; 43 Yale L. J. 506; Robinson, *"Contract" Jurisdiction in Admiralty,* 10 Tulane L. Rev. 359, 396; Robinson on Admiralty, *supra* 200, n. 173. The form of the remedy there enforced, a lien *in rem*, would not seem to suggest any point of distinction; the opportunity to seize a vessel does not of itself transform a land to a maritime cause; and actually *in personam* jurisdiction had there already been upheld in the decision of the Ninth Circuit below, reversing the district court's outright dismissal. See *The Pacific Cedar,* 9 Cir., 61 F. 2d 187, reversing *The Pacific Hemlock,* D. C. W. D. Wash., 53 F. 2d 492, and which is itself reversed only on its dismissal of the libel *in rem*, the sole issue before the Supreme Court.

It is true, as Judge Hand points out, that Justice Stone did find a breach of the maritime contract in the overcharge; and hence Judge Hand has limited his agreement with us that jurisdiction obtains to the finding of such a breach as a prerequisite. But we think this limitation is difficult to work out in any practical sense and may bring back the kind of arbitrary restriction which the *Krauss* case wiped out. This was stated not as a condition of decision in the *Krauss* case, but only as a fact illustrating

the narrowness of a distinction that the orginal charter party may be in admiralty, while refund of an exaction under it may not. So Justice Stone, in referring to the objection that the cause of action lies only at common law, and not in admiralty, went on to say: "The objection applies with equal force to the liens allowed for excess freight, payment of which was procured by fraud or duress, or for freight paid in advance where the voyage was abandoned after the ship was loaded." It was at this point that he said that admiralty is not concerned with the form of the action, but with its substance, as we quoted above.

In all these cases it may be broadly true that the original admiralty charter was at the base of the case. But from the standpoint of recovery, the action is not for its breach, but for a debt, i.e., the refund due in good conscience. So in our present case, while the claim is one for overpayment beyond the charter hire, nevertheless the original charter is but a first step, being supplemented by the two further and important steps, first, the modification of the contract by the express terms of an extensive statute and, second, the government's detailed analysis and application of the statutory modification. We think it sounder, and more in accordance with the nature of admiralty, to rest upon the inherent maritime character of the underlying transaction, rather than upon an attempt to force this claim into the mold of a breach of contract. This broader approach also answers various aspects of the libelant's present contention, such as that admiralty jurisdiction cannot rest upon a claim on a statute or must concern a single definite vessel. Such limitations are contrary to the real spirit of admiralty, and actually have not been followed in various situations, of which some examples are collected in the footnote. [10] These all support, often without explicit analy-

[10] Selected examples may include *United States* v. *La Vengeance*, 3 U. S. 297, 3 Dall. 297, 300, libel for a statutory penalty involving export of arms, "a water transaction"; *The Hope, Hobart* v. *Drogan*, 35

sis, admiralty jurisdiction over these claims so basically and intimately intertwined with our vast shipping and maritime interests.

There are two comparatively recent cases in our circuit which follow its older restriction upon admiralty, viz., *Silva* v. *Bankers Commercial Corp.*, 2 Cir., 163 F. 2d 602, by dictum, and *Archawski* v. *Hanioti*, 2 Cir., 223 F. 2d 406, by decision. In both these, however, it appears that the *Krauss* case was not cited or brought to the attention of the court, just as the *Archawski* case was not brought to our attention on the original argument. Now we learn also that in the *Archawski* case certiorari has been granted upon this issue, 350 U. S. 872, which will soon be argued in the Supreme Court; that the same issue was extensively argued in the Court of Claims on December 5 last in two cases where the government takes the same position as here, namely, that admiralty has jurisdiction; and that the issue is also raised in the appeal of *American Eastern Corp.* v. *United States*, D. C. S. D. N. Y., 133 F. Supp.

U. S. 108, 10 Pet. 108, 119, 120, libel on a state statute for compulsory pilotage; *Ex parte McNiel*, 80 U. S. 236, 13 Wall. 236, 242, a similar case; *The J. E. Rumbell*, 148 U. S. 1, 12, libel on a state statute giving a lien for a maritime claim—the admiralty jurisdiction is exclusive; *Allanwilde Transport Corp.* v. *Vacuum Oil Co.*, 248 U. S. 377, 3 A. L. R. 15 (with two companion cases), libel for refund of prepaid freight; *Globe & Rutgers Fire Ins. Co.* v. *United States*, 2 Cir., 105 F. 2d 160, certiorari denied 308 U. S. 611, the same; *The Harriman*, 76 U. S. 161, 9 Wall. 161, 174, the same, where the exaction is excessive; and *Commercial Trust Co.* v. *United States Shipping Board Emergency Fleet Corp.*, 2 Cir., 48 F. 2d 113, a common count for money had and received to trace a pledge on a maritime loan into third-party hands held cognizable only in admiralty. See also the many libels sustaining as of course libels for damages, contrary to the provisions of contracts or bills of lading which are rendered unenforceable by Acts of Congress, e.g., *Knott* v. *Botany Worsted Mills*, 179 U. S. 69, 77; *The Southwark*, 191 U. S. 1, 16, 17; *United States* v. *Atlantic Mut. Ins. Co.*, 343 U. S. 236, affirming *United States* v. *Farr Sugar Corp.*, 2 Cir., 191 F. 2d 370; *Pan-Am Trade & Credit Corp.* v. *The Campfire*, 2 Cir., 156 F. 2d 603, certiorari denied 329 U. S. 774; and *Balfour, Guthrie & Co.* v. *American-West African Line*, 2 Cir., 130 F. 2d 320, 322, certiorari denied *Balfour, Guthrie & Co.* v. *The Zarembo*, 320 U. S. 804.

11, now on our appellate calendar. Seemingly also various other cases involving such claims for repayment of charter hire are pending. The question is obviously important; and clearly we have not until now received that full assistance of counsel which makes for good decisions, while our own researches, perhaps adequate for mere decision, have not covered all the latest ramifications of the problem. Counsel sometimes feel that the court unwisely goes beyond the arguments presented to conduct its own studies and reach its decision thus independent; but these cases are a warning to us, as well as to them, that such excursions are often quite vital to adequate adjudication.

Our conclusion therefore is again that the action was properly brought in admiralty, but that it must fail because of the running of the statute of limitations and also because of the release contained in the executed Plan of Arrangement. Hence we reaffirm our decision affirming the dismissal of the libel.

HAND, *Circuit Judge* (concurring in part and dissenting in part):

My mind has not changed as to any of the three questions that we discussed before. Regardless of how I might have decided the question as *res nova*, I should have followed *United Transportation Co.* v. *New York & Baltimore Transportation Co.*, 185 Fed. Rep. 386, because, except for special circumstances, I should follow any precedent of this court that had not only remained unchallenged for so long, but had been twice expressly followed. My only reason for not doing so in this instance was that in *Krauss Bros. Lumber Co.* v. *Dimon S.S. Corp.*, 290 U. S. 117, the Supreme Court appears to me to have put its decision squarely upon the theory that it is a breach of the contract of carriage for a carrier to demand and receive more than the stipulated freight, even though the payment is not made

a condition upon delivery. Naturally, it is not for me to pass upon the correctness of that interpretation of such a contract.

However, I differ with my brothers in the change they are making in our decree. Strictly, we should not originally have "affirmed" the decree of the district court as we did, because it had been based upon the notion that the "arrangement" was a bar to the suit. Now that we have decided that the libel was filed too late, Judge Murphy never got jurisdiction over the claim at all; and our decision as to the effect of the arrangement is as little within our own jurisdiction as it was within his. Perhaps this was corrected by what was nevertheless an inconsistent statement: that the libel was to be "dismissed for lack of jurisdiction of the district court"; but, be that as it may, I do not agree that our decree should now be amended to determine what was the effect of the arrangement.

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 898

SMITH-JOHNSON STEAMSHIP CORP., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner chartered certain war-built vessels from the United States under the Merchant Ship Sales Act of 1946 and the Merchant Marine Act of 1936. Asserting that it had been overcharged because the charter hire had been computed in violation of statutory directions, petitioner brought suit in the Court of Claims seeking to recover the alleged excess (Pet. 3-6). The Government's answer set up, among others, the special defense that the subject matter of the litigation was under the exclusive jurisdiction of the admiralty courts by virtue of the Suits in Admiralty and Public Vessels

Acts (R. 9, 11). The Court of Claims held that petitioner's cause of action was not maritime in nature and granted the petitioner's motion to strike the special defense (R. 121-126).[1]

A motion for a rehearing was filed by the United States on May 2, 1956 (R. 147-162). Petitioner meanwhile, on March 26, 1956, filed a motion for summary judgment of liability (R. 131) which the Court of Claims has set for argument on its June calendar (R. 132-133).

Although petitioner was the prevailing party in the Court of Claims, it now seeks a writ of certiorari on the ground that the decision below is in conflict with the decision of the Court of Appeals for the Second Circuit in *Sword Line, Inc.* v. *United States*, 228 F. 2d 344, rehearing denied, 230 F. 2d 75, now pending before this Court on petition for a writ of certiorari, No. 861, this term. In *Sword Line*, although we believe that the result reached by the court below is correct, we do not

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[1] The instant case was but one of four cases, specifically selected to explore the typical issues raised in the "additional charter hire cases." In two of those cases, *Pacific Far East Line, Inc.* v. *United States* and *Black Diamond S.S. Corp.*, decided together with the instant one, the United States had moved to dismiss the petition and the Court of Claims denied the motion (Pet. 15, 20). In another companion case, *Marine Transportation Lines, Inc.* v. *United States*, No. 242-55, also decided on March 6, 1956, the Court of Claims denied a motion for summary judgment based on lack of jurisdiction. In the last case, the Court held that, having jurisdiction over the claim for overpayment, it also could dispose of three additional "subsidiary" claims despite the fact that these claims, aggregating a sum far in excess of the "principal" claim, were without doubt of a maritime nature.

oppose, but rather urge the granting of the writ of certiorari in view of the conflict of the decision with that of the Court of Claims in the instant and the three other test cases,[2] and of the importance of the issue in general.

In the instant case, however, we cannot acquiesce in the grant of the petition for certiorari although we believe that the decision of the Court of Claims is erroneous. To the contrary, we consider it our duty to point out that the review of the decision below on the basis of the instant petition is precluded by two peremptory jurisdictional obstacles: —(a) the circumstance that review is sought by the party which prevailed in the Court of Claims and (b) the pendency of a petition for a rehearing in the Court of Claims.

1. The instant petition has been filed by a prevailing party which seeks unqualified affirmance of the decision below.[3] Only a party aggrieved by a judgment, however, has standing to seek review. *Maryland Insurance Co.* v. *Woods*, 6 Cranch 29, 42-43; *Corning* v. *Troy Iron & Nail Factory*, 15 How. 451, 464; *New York Telephone Co.* v. *Maltbie*, 291 U.S. 645; *Lindheimer* v. *Illinois Telephone Co.*, 292 U.S. 151, 176; *Public Service Commission* v. *Brashear Lines*, 306 U.S. 204, 206; *Electrical Fil-*

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[2] See p. 2, fn. 1, *supra*.

[3] We are not confronted with the situation where the generally prevailing party seeks review of those parts of the decision which are adverse to it and which may form the basis for a collateral estoppel. Cf. *Portmar Corp.* v. *Paramount Corp.*, 347 U.S. 89, 99, fn. 6; *New York Telephone Co.* v. *Maltbie*, 291 U.S. 645.

tings Corp. v. *Thomas & Betts Co.*, 307 U.S. 241, 242; *United States* v. *Adamant Co.*, 197 F. 2d 1, 5 (C.A. 9), certiorari denied, 344 U.S. 903; *United States* v. *Shelley*, 218 F. 2d 157, 158 (C.A. 2). And since a petition for review brings up only that which was decided adversely to petitioner (*Loudon* v. *Taxing District*, 104 U.S. 771, 774; *Lloyd Sabaudo Societa* v. *Elting*, 287 U.S. 329, 331), the grant of the petition would be futile in the instant case.

The requirement that only an aggrieved party has standing to request review has not been abrogated by 28 U.S.C. 1254(1) which permits a party prevailing in the District Court to apply for a writ of certiorari before judgment.[4] This provision, of course, presupposes that an appeal, noted by the unsuccessful party in the District Court, be pending *in* the Court of Appeals; it only gives the appellee the privilege of requesting the transfer of the review to the Supreme Court. In other words, review by an appellate tribunal is still initiated by the party aggrieved by the trial court's determination; the provision for certiorari before judgment merely allows the prevailing party to substitute this Court as the appellate forum in place of the Court of Appeals. There is no comparable situation here. Review is sought to be initiated by petitioner, the prevailing party in the trial court, and not by the aggrieved party, the United States.

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[4] See *e.g.*, *United States* v. *United Mine Workers*, 329 U.S. 708, 330 U.S. 258; *Youngstown Co.* v. *Sawyer*, 343 U.S. 937, 579; Rule 20 of the Revised Rules of this Court.

2. At the time when this petition for a writ of certiorari was filed respondent's time to petition for a rehearing had not expired.[5] Our petition for rehearing was filed on May 2, 1956 (R. 147). In view of this pending motion for a rehearing, the petition for certiorari is premature. *United States* v. *Ellicott*, 223 U.S. 524, 539; *Southern Pacific Co.* v. *United States*, 270 U.S. 103. Assuming that the decision below may have been reviewable at the time the petition for certiorari was filed, its effect and reviewability became suspended upon the filing of respondent's motion for a rehearing, and this Court will regain jurisdiction to review it only after the disposition by the Court of Claims of the petition for rehearing. *Southern Pacific Co.* v. *United States*, 270 U.S. 103, 105-106.[6]

3. The issues raised by this petition are substantially identical with those presented in *Sword Line*. The instant petition, however, is confronted with the two fundamental jurisdictional obstacles we have just discussed and with a potential third jurisdictional problem—the interlocutory char-

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[5] This time was extended to and including May 5, 1956 (R. 130).

[6] The complications arising in the instant case from the filing of the petition of certiorari by the prevailing party, prior to the expiration of the time within which the losing party could file its motion for a rehearing, emphasize the soundness of the rule which limits the right to seek review to the aggrieved party. Similar considerations flow from the general rule that, once a case is on review, the lower court lacks jurisdiction to grant a rehearing. Cf. Moore, *Federal Practice* (2nd Ed.), Vol. 6, Section 59.09[5]. The prevailing party cannot be permitted, by the expedient of seeking review, to deprive his opponent of the right to move for a rehearing or new trial.

acter of the ruling below.[7] For these reasons, it is our belief that the Court will never reach, on this petition, the issue of admiralty jurisdiction, and that this petition should be dismissed or denied without awaiting the Court's determination of the *Sword Line* case.

Respectfully submitted,

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MAY 1956.

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[7] The decision below merely struck a defense asserting lack of jurisdiction; it did not dispose of any of the substantive issues. It is thus essentially interlocutory in nature. However, 28 U.S.C. 1255, does not limit review to final decisions in express terms, and procedural economy may make it desirable to obtain a speedy determination by this Court of the existence *vel non* of jurisdiction in the Court of Claims, especially in cases potentially involving long and complicated trials. But even if the United States, as the aggrieved party, should file a petition for certiorari to review the rulings of the Court of Claims (assuming that the Government's motion for rehearing is denied), the problem of this Court's jurisdiction at this stage, under 28 U.S.C. 1255, would have to be faced.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 898

SMITH-JOHNSON STEAMSHIP CORP.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITIONER'S REPLY TO MEMORANDUM IN OPPOSITION

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In the Supreme Court of the United States

October Term, 1955

No. 898

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Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner's Reply to Memorandum in Opposition

Respondent does not dispute that because of the conflict in the decision of the Court below with that of the Second Circuit in *Sword Line, Inc.* v. *United States* (now pending before this Court on petition for writ of certiorari, No. 861) and the importance of the issue in general, the petition presents a case which should be re-

viewed by this Court. Respondent opposes the granting of the writ because:

> " . . . we consider it our duty to point out that the review of the decision below on the basis of the instant petition is precluded by two peremptory jurisdictional obstacles: —(a) the circumstance that review is sought by the party which prevailed in the Court of Claims and (b) the pendency of a petition for a rehearing in the Court of Claims." (Memorandum in Opposition, at p. 3.) [1]

1. This Court is empowered to review the decision of the Court below at the petition of the prevailing party.[2]

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[1] We do not discuss in detail Respondent's suggestion that the interlocutory nature of the decision below poses a potential third jurisdictional problem (Memorandum in Opposition, pp. 5-6 and footnote 7). This Court's jurisdiction to review non-final orders of the Court of Claims is well established. *United States* v. *Esnault-Pelterie*, 299 U.S. 201, 202-3, and note 4; *United States* v. *Alcea Band of Tillamooks*, 329 U.S. 40, 341 U.S. 48, 49; *Marconi Wireless Teleg. Co.* v. *United States*, 320 U.S. 1, 47. Cf. *Wheeler Lumber Bridge & Supply Co.* v. *United States*, 281 U.S. 572, 577-78.

[2] The cases cited by respondent do not support its position that only the party aggrieved by a judgment can seek its review. In *New York Telephone Co.* v. *Maltbie*, 291 U.S. 645, *Lindheimer* v. *Illinois Bell Tel. Co.*, 292 U.S. 151, and *Electrical Fittings Corporation* v. *Thomas & Betts Co.*, 307 U.S. 241, the appellants (cross-appellant in the *Lindheimer* case) appealed from decrees in their favor because they objected to the findings upon which such decrees were based. In the *Lindheimer* and *New York Telephone* cases this Court dismissed the appeals because the findings upon which they were based were not *res judicata*. (291 U.S., at 645; 292 U.S., at 176.) Consequently, the appeal brought no case or controversy before this Court. In the *Electrical Fittings Corporation* case, the finding to which objection was made was that a patent claim was valid although the court awarded judgment to the defendant petitioner because it found there had been no infringement. This Court reviewed on certiorari and reversed the portion of the decree holding the claim valid because it operated as an adjudication. (307 U.S., at 242.) The three cases together stand for the

This Court granted certiorari upon the peition of the successful party in *United States* v. *Bankers Trust Co.*, 294 U.S. 240, 294-295, in *United States* v. *United Mine Workers*, 330 U.S. 258, 269, and in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 584. There is no material difference between the jurisdictional statutes under which certiorari was granted in those cases (Section 240(a) of the former Judicial Code and 28 U.S.C. § 1254) and 28 U.S.C. § 1255, under which the Court's jurisdiction is invoked in this case.

This question was thoroughly briefed by the Government in its petition for certiorari in the *Bankers Trust Company* case. We agree with and adopt the Govern-

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proposition that while this Court may by way of certiorari review any case in which an actual controversy exists, it will not review a case when no controversy exists. Cf. *Gay* v. *Ruff*, 292 U.S. 25. *United States* v. *Adamant Co.*, 197 F. 2d 1, 5 (C.A. 9), cert. denied 344 U.S. 903, and *United States* v. *Shelley*, 218 F. 2d 157, 158 (C.A. 2) were decided on the same basis.

The remaining cases cited by respondent are not in point. In *Maryland Insurance Co.* v. *Woods*, 6 Cranch. 29, the defendant, not the plaintiff, appealed from a judgment based on a jury's verdict. The Court said that an exception taken by the plaintiff to the charge of the jury in the court below was not involved in the appeal. In *Corning* v. *Troy Iron & Nail Factory*, 15 How. 451, plaintiff-appellant appealed because he disagreed with the *reasons* why the court below entered a decree in his favor. The Court held that the reasons were not appealable. In *Public Service Commission* v. *Brashear Lines*, 306 U.S. 204, the Court dismissed a direct appeal from a three-judge court by the State Public Service Commission from a decree of the court below denying certain claimed fees. The basis of the decision was that the statute which authorized such direct appeals, Section 266 of the Judicial Code, limited them to appeals "from a final decree granting or denying a permanent injunction." 306 U.S., at 206. Both *Loudon* v. *Taxing District*, 104 U.S. 771, 774; and *Lloyd Sabaudo Societa* v. *Elting*, 287 U.S. 329, 331, stand for the proposition that this Court will review only such matters as have been brought before it by appeal or certiorari.

ment's argument in that case. This argument is printed as an appendix to this memorandum.

Respondent says (at p. 4 of its Memorandum in Opposition) that Section 1254 (1) "presupposes that an appeal, noted by the unsuccessful party in the District Court, be pending *in* the Court of Appeals; it only gives the appellee the privilege of requesting the transfer of the review to the Supreme Court."

There is nothing in the language of the jurisdictional statutes, their apparent purpose, or the circumstances in which they were invoked in the foregoing cases that implies this limitation on the Court's jurisdiction.

On the contrary, such a limitation would tend to frustrate the congressional purpose to grant to this Court authority to settle immediately questions pending in lower courts of such imperative public importance as to justify the deviation from normal appellate processes (See Rule 20). Since the public interest is paramount in the exercise of certiorari jurisdiction, there is no warrant to impose jurisdictional restrictions beyond those contained in the language of the jurisdictional statutes.

The generality of the statutory provisions "was not a mere matter of accident. It expressed the thought of Congress distinctly and clearly, and was intended to vest in this court a comprehensive and unlimited power." *Forsyth* v. *Hammond*, 166 U.S. 506, 513.[3]

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[3] These remarks were made concerning Section 6 of the Circuit Courts of Appeals Act of March 3, 1891, from which the present statute derives by a series of amendments. The amendments did not limit but rather emphasized the plenary authority conferred upon this Court. For the history of the Statute until it took the form of § 240(a) of the Judicial Code, see Appendix, pp. 1a *et seq.*,

The sole jurisdictional requirement is that an actual case be in the court below. *Gay* v. *Ruff*, 292 U. S. 25, 30. The sole criterion for its exercise is this Court's discretion (Rules 19 and 20).

2. Respondent could not divest this Court of jurisdiction by applying for rehearing and clarification in the court below after the petition for certiorari was filed here.[4] The decision of the court below was made on March 6, 1956 (R. 121). The petition for certiorari was filed in this Court on April 24, 1956 and Respondent's motion for rehearing and clarification was filed in the court below on May 2, 1956 (R. 147).

The decision of the Court of Claims was reviewable at the time it was made although the court had power to reconsider its decision. *Marconi Wireless Teleg. Co.* v. *United States*, 320 U.S. 1, 47-48.

The existence of this power did not affect the finality or reviewability of the order. The time to seek review began to run when the order was made. Petitioner was not obliged to wait and see whether respondent would

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infra. The revisor's notes state that the effect of the present codification:

> ". . . is to preserve existing law and retain the power of unrestricted review of cases certified or brought up on certiorari." (See note to 28 U.S.C.A. § 1254.)

[4] Respondent here objects to the grant of certiorari, while in the court below it has suggested that the very question raised by this petition be certified to this Court. In its Motion for Rehearing and Clarification filed below, Respondent said (R. 153):

> "This Court might properly reconsider its prior decision and either hold these cases in abeyance pending decision of the Supreme Court in the cases pending there or might certify the two questions here involved for decision by the Supreme Court along with any other cases in which certiorari may be granted [citing *Sword Line Inc.* v. *United States*, No. 861, Oct. Term, 1955; *Smith Johnson SS Corp.* v. *United States*, No. 898, Oct. Term 1955.]"

seek rehearing in the court below. *Market Street Railway Co.* v. *Railroad Commission,* 324 U.S. 548, 551-2. Nor did Respondent's subsequent application for rehearing divest this Court of the jurisdiction it lawfully acquired when the petition was filed. *Wyle* v. *Coxe,* 14 How. 1.

The cases cited by respondent, *United States* v. *Ellicott,* 223 U.S. 524, and *Southern Pacific Co.* v. *United States,* 270 U.S. 103, are cases in which the appellant's application for rehearing in the court below was pending at the time its appeal was filed. These cases do not stand for the proposition that an application for rehearing in a lower court divests this Court of jurisdiction over a pending certiorari proceeding. Such a doctrine would place in the hands of the Respondent the power to delay this Court from reviewing a case, no matter how great the public exigency might be, by simply asking the court below to modify or clarify its ruling after a petition for certiorari had been filed.[5]

For the foregoing reasons, we submit that this Court has jurisdiction to grant the writ.

Respectfully submitted,

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Of Counsel:
GEORGE BRONZ

MAY 22, 1956

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[5] In this connection, it should be noted that an application for rehearing by the United States would, under certain circumstances, be timely if made

". . . at any time while any suit is pending before it, or after proceedings for review have been instituted, or within two years after the final disposition of the suit . . ." (Rule 53 (a)(2), and Rule 53 (c), Rules of the Court of Claims.)